STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM CHARLESTON,

Defendant-Appellant.

UNPUBLISHED
December 28, 1999

No. 209088
Kalamazoo Circuit Court
LC No. 97-000634 FH

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant Adam Charleston appeals by right his jury conviction of unarmed robbery, MCL 750.530; MSA 28.798, under an accomplice theory of guilt. Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of 5 to 22½ years imprisonment. We affirm.

This case arises out of a robbery that occurred in the early afternoon hours on the streets of Kalamazoo. At trial, Roy Scruggs testified that on May 16, 1997, he was on his way home after purchasing a quart of beer at a local convenience store. As he walked along the railroad tracks, he heard a voice from behind ask him for a "light" and a drink of Scruggs' beer. The individual, later identified as Terrence McCullough, took one drink and then struck Scruggs across the face with the bottle. Scruggs immediately fell to the ground and, upon getting back up, began to run. McCullough followed him, caught up to him, and the two began to struggle. Defendant came from around a corner and began questioning Scruggs about taking "something from him." As Scruggs put his head down in an apparent attempt to protect himself, one of the two aggressors demanded that Scruggs remove the rings on his hand. Scruggs threw the rings onto the ground, after which the two men left. When Scruggs got up, the rings were gone. Both McCullough and defendant were arrested later that same day. At the time of his arrest, McCullough was in possession of the rings taken from Scruggs during the attack.

I

On appeal, defendant first argues that the trial court erred in denying his motion for a new trial on the ground that his trial counsel was ineffective. We disagree. A trial court's decision on a motion

for a new trial is reviewed for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). "This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994); People v Underwood, 184 Mich App 784, 786, 459 NW2d 106 (1990).

In requesting a new trial below, defendant argued that as a result of two "serious" errors by his trial counsel, he was deprived of the effective assistance of counsel guaranteed under the Sixth Amendment. In order to succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was below an objective standard of reasonableness and a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra* at 466 US 694. Here, even assuming counsel had objected, we do not believe the outcome would have been different.

The alleged errors stem from counsel's actions regarding testimony elicited from Officer Steven Reifert at trial. On direct examination by the prosecution, Reifert testified that in his continuing investigation of the crime, he had an opportunity to talk with Scruggs who was afraid to speak about the incident because "apparently there's been some threats made." Counsel for defendant did not object to this statement. Scruggs had earlier testified he was reluctant to be in court but his reluctance was not due to the fact that "some people had talked to [him] and said some things to [him]." On cross-examination, counsel for defendant asked Reifert the basis for his belief that defendant had made threats. Reifert responded that both Scruggs and his girlfriend told him of a threatening incident involving defendant; Reifert was unable to recall the nature of the incident, however. On appeal, defendant argues that in light of the weak nature of the prosecution's case, this testimony was extremely damaging and that his counsel's failure to appropriately deal with the testimony prejudiced him such that a new trial is required. We disagree.

The prosecution's theory of the case was that defendant and McCullough had worked together in assaulting and robbing Scruggs and thus defendant was guilty of unarmed robbery as an aider and abettor. Although in her closing argument the prosecutor addressed Scruggs' reluctance to testify at trial, she argued that such reluctance was based upon the beating received by Scruggs at the time of the robbery. The prosecutor never mentioned the alleged threats. In light of the fact that the prosecutor did not use the disputed testimony to support her theory of the case, we do not believe that defendant has shown that he was prejudiced by his counsel's failure to object. Accordingly, we find no ineffective assistance of counsel.

Defendant further asserts that counsel was ineffective because he failed to object or otherwise attack hearsay statements that Officer Reifert made regarding Scruggs' account of the incident while still at the scene of the robbery. On cross-examination, Reifert testified that Scruggs had told him defendant was involved in the initial assault near the railroad tracks and had acted in concert with McCullough throughout the entire ordeal. This story directly conflicts with the testimony Scruggs gave during trial

that defendant did not join the fray until after McCullough had chased him across Lake Street. On appeal, defendant argues that counsel's failure to move to strike Reifert's testimony as hearsay or to at least request instruction regarding the limited use of this prior inconsistent statement requires that a new trial be had, and that the trial court's refusal to grant a new trial on that basis represents an abuse of discretion. Again, we disagree.

In order to prevail on a claim of ineffective assistance, a defendant must overcome a strong presumption that counsel's actions reflected sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). At the hearing on the motion for new trial, defendant's trial counsel testified that his strategy was to show the inconsistencies in the testimony of the various prosecution witnesses, and that allowing the inconsistent hearsay was part of that strategy. An objection to the hearsay information elicited by counsel on cross-examination would have been inconsistent with this strategy. Moreover, while a limiting instruction may have been appropriate, absent the advantage of hindsight, we cannot say that defense counsel performed below the standards of a reasonably competent attorney. See *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). It is well established that this Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997); *Barnett*, *supra* at 338.

We further note that even though such an instruction may have been appropriate, the failure to request the instruction was not so serious as to deny defendant effective assistance. The Sixth Amendment guarantees reasonable assistance of counsel, but it does not guarantee infallible counsel. *People v Mitchell*, 454 Mich 145, 171; 560 NW2d 600 (1997). In addition, even assuming an objection and request for limiting instructions were necessary, we do not believe that defendant suffered prejudice. See *Strickland*, *supra* at 694. When instructing the jury, the trial court gave substantial directions on judging the credibility of witnesses, including the use of conflicting testimony. As such, we find no abuse of discretion by the trial court in denying defendant's motion for a new trial.

II

Next, defendant contends that the trial court should have sua sponte instructed the jury that Scruggs' prior inconsistent statement to Officer Reifert could not be used as substantive evidence but only to impeach Scruggs' trial testimony. Once again, defendant argues that in light of the extremely weak nature of the prosecution's case, failure to instruct the jury on the proper use of impeachment evidence was so prejudicial as to require a new trial. We disagree.

Claims of instructional error are viewed in the context of all the instructions given. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). A defendant is not entitled to a new trial if the instructions sufficiently protected the rights of the defendant and fairly presented to the jury the issues to be tried. See *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995). A witness' inconsistent out-of-court statements are admissible only for impeachment purpose, and because they otherwise constitute hearsay, they cannot be used as substantive evidence of the truth of the matter asserted. *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981). Generally, when a

prior inconsistent statement has been admitted in order to impeach a witness, the trial judge should instruct the jury that the prior statement, not made under oath during the trial, cannot be used as substantive evidence of guilt. *Id.*; see also CJI 4:5:01; MRE 801(d). It is well settled, however, that absent an objection to the jury instructions, relief will be given only when necessary to avoid manifest injustice to the defendant. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Moreover, where no request has been made for a limiting instruction on the use of prior inconsistent statements, the general rule is that relief will not be given when there is no demonstration or likelihood of prejudice and where neither the court nor the prosecutor suggested to the jury that prior inconsistent statements could be used as substantive evidence. *People v Stanton*, 190 Mich App 558, 562-563; 476 NW2d 477 (1991); see also *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999) ("in the absence of a request or objection, the appellate courts have declined to impose a sua sponte duty on trial courts to give limiting instructions . . . even if such an instruction should have been given.")

In the case at bar, we are unpersuaded that defendant has demonstrated the requisite likelihood of prejudice. In *People v Cox*, 61 Mich App 37, 40; 232 NW2d 188 (1975), this Court observed that "[s]uch prejudice is rarely shown," but reversed on finding that the record showed the jury was confused as to how it should consider the inconsistent statement and focused on that testimony in their deliberations. That is not the situation here. Nothing in the record exists which would suggest that the jury was confused as to the proper use of the disputed testimony.

Moreover, neither the court nor the prosecutor suggested that Reifert's testimony regarding Scruggs' initial statements could be used as substantive evidence. Cf. *Kohler*, *supra* at 599-600. In light of the testimony offered by McCormack, who testified that he saw defendant chasing Scruggs near the railroad tracks, the only probative use of Reifert's testimony was to impeach Scruggs' trial testimony that defendant did not join the fray until after McCullough had already attacked and chased him across the railroad tracks. *People v Hodges*, 179 Mich App 629, 632-633; 446 NW2d 325 (1989). As such, there was little danger that Scruggs' inconsistent statement would be treated erroneously as substantive evidence of defendant's guilt.

As a final consideration, we again note that the instructions actually given by the trial court correctly informed the jury regarding the factors they should use in evaluating the testimony of the various witnesses. Viewed as a whole, the instructions did not mislead the jury or otherwise prejudice defendant. *Caulley, supra*. Therefore, we do not believe that the trial court's failure to sua sponte give a limiting instruction on the use of the disputed statement is grounds for relief. *Moldenhauer, supra*.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey